

State of Minnesota  
**In Court of Appeals**

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CHARLES RODENWALD AND GAYLE RODENWALD,

*Appellants,*

vs.

STATE OF MINNESOTA DEPARTMENT OF NATURAL RESOURCES,

*Respondent.*

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**BRIEF AND APPENDIX OF APPELLANTS  
CHARLES AND GAYLE RODENWALD**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## LEGAL ISSUES

### **I. Whether the mere slipperiness doctrine applies to state agencies.**

The Trial Court ruled that while there are no known instances in which the mere slipperiness doctrine has ever been applied to immunize the State, the public policy behind the doctrine demands that it applies.

Bufkin v. City of Duluth, 291 N.W.2d 225 (Minn. 1980)

Doyle v. City of Roseville, 524 N.W.2d 461

(Minn. 1994)

Minn. Stat. § 466.01

### **II. Whether the mere slipperiness doctrine applies to injuries where the State specifically instructs an invitee to a known danger that is not open to the public.**

The Trial Court applied the mere slipperiness doctrine despite the fact that Defendant directed Mr. Rodenwald to a non-public area on state property that Defendant knew was icy.

Otis v. Anoka-Hennepin School Dist. No. 11

611 N.W.2d 390, 392 (Minn. App. 2000).

Doyle v. City of Roseville, 524 N.W.2d 461

(Minn. 1994)

### **III. Whether the State is entitled to sovereign immunity beyond the scope of Minn. Stat. § 3.736.**

The Trial Court held that the State is entitled to sovereign immunity under common law mere slipperiness doctrine in addition to Minn. Stat. §3.736.

In Re Alexandria Accident of February 8, 1994

(561 N.W.2d 543 (Minn. App. 1997)

Minn. Stat. § 3.736.

### **IV. Whether there are genuinely disputed material facts that preclude summary judgment.**

The Trial Court ruled that there are no material facts in dispute.

Doyle v. City of Roseville, 524 N.W.2d 461

(Minn. 1994).

## STATEMENT OF FACTS

### Undisputed Facts

This incident occurred at a property owned by Defendant State of Minnesota in Orr, Minnesota. The site is used by the Department of Natural Resources as a local headquarters for forestry employees. The supervisor of the Orr forester site is John Stegmeir. Appendix, p. 37. Specifically, this incident occurred in the driveway immediately in front of a garage known as the “Crane Lake shop.” Appendix, p. 38.

DNR employees were aware that, in the springtime, ice would tend to form in the driveway in front of the Crane Lake shop. Appendix, p. 39. Snow would melt, and then freeze, forming ice. Id. The Crane Lake shop was regularly used by employees of the DNR up to and including March 15, 2007. They would have to keep the driveway plowed, using a pickup owned by the DNR. Appendix, p. 39. Buckets of salt and sand were available in several buildings located on the site for use by employees to remedy the icy conditions. Appendix, p. 40. There was no formal policy for inspection for ice or slipperiness on the property, but if an employee noticed the problem, he or she would be expected to report it. Appendix, p. 40. John Stegmeir believed that the ice upon which Charles Rodenwald fell on March 15, 2007 had formed during the previous week. Appendix, p. 41. This was not unusual in that area for that time of year. Appendix, p. 41.

Some time before March 15, 2007, an employee at the Orr DNR office called Auto Glass Specialists in Duluth to repair two windshields in vehicles located at the Orr site. Appendix, p. 38. Charles Rodenwald was retired from work as an auto glass specialist, but volunteered to help with the job on March 15, 2007. Appendix, p. 14. He drove with Brett Bergman in an Auto Glass Specialists van from Duluth to Orr, arriving at the DNR site at about 11:30 a.m. Id. They first replaced a windshield at the “south” garage. Appendix, p. 14. There was no ice located in that area. Id.

After that project, Mr. Bergman made a phone call to someone at the DNR office, and was directed to what Mr. Rodenwald called the “north” garage, and what DNR employees called the “Crane Lake shop.” Appendix, p. 15; Appendix, p. 38. Mr. Bergman pulled into the area where he had been directed. This was on a gravel driveway immediately in front of a garage door. Appendix, p. 34. Mr. Rodenwald opened the passenger door, stepped out, and fell onto his left side after taking one or two steps. Appendix, p. 15. He suffered a fractured hip.

The ice that Mr. Rodenwald slipped on was smooth, with no snow on top. Appendix, p. 15-16. Portions of the driveway were covered with ice. Appendix, p. 29. It was slippery and smooth, with no sand or salt on it. Appendix, p. 29, Appendix, p. 34.

It was so slippery in the immediate area where Mr. Rodenwald fell that the ambulance people were unable to attend to him until the area was salted and sanded. Appendix, p. 16. Michael Peloquin, a long-term DNR employee, took a bucket of

salt and sand from a nearby building and spread it on the area. Appendix, p. 34. Another DNR supervisor put up a “blockade” to guard the slippery areas from other people on the scene. Appendix, p. 29.

The weather at that time was cloudy, with no precipitation. Appendix, p. 15; Appendix, p. 29, Appendix, p. 35. According to weather records, warm weather earlier in the week had turned colder approximately 20 hours before Mr. Rodenwald’s slip and fall Appendix, p. 47-48. The temperature for all of March 15, 2007, was well below freezing, and only approximately 18 degrees Fahrenheit at the time Mr. Rodenwald fell. Id. John Stegmeir, after inspecting the site later that day, estimated that the ice had formed during the warm weather over the past week. Appendix, p. 41 (emphasis added).

#### Genuinely Disputed Material Facts

The following relevant facts are in dispute:

- 1. Was the ice upon which Plaintiff fell “newly formed glare ice” as maintained by Defendant, or ice which had formed over the previous week as described by the DNR supervisor?**
- 2. Was the area where Plaintiff fell a sidewalk or street normally traversed by the public, or private property owned by the state DNR which was not generally opened to the public?**
- 3. Was it snowing at the time of Plaintiff’s fall?**
- 4. Had the hazard of the ice forming, or the formation of the ice itself, been in existence long enough for the Defendant to have had actual or constructive notice of it?**

5. Was a “freeze thaw temperature cycle” occurring on the day that Plaintiff slipped and fell?

## ARGUMENT

### Standard of Review

Summary judgment is appropriate when a district court determines that “there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03.

The Court of Appeals reviews a district court's grant of summary judgment to determine whether there are any genuine issues of material fact and whether the court erred in its application of the law. Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995). On appeal, The Court views the evidence in the light most favorable to the party against whom the motion for summary judgment was granted. Id.

When there are no genuine issues of material fact and the appeal turns on purely legal issues, review is de novo. Progressive Specialty Ins. Co. v. Widness ex rel. Widness, 635 N.W.2d 516, 518 (Minn.2001).

### **I. THE MERE SLIPPERINESS DOCTRINE APPLIES TO MUNICIPALITIES, NOT STATE AGENCIES.**

The mere slipperiness doctrine was a common law principle which extended sovereign immunity to municipalities for injuries caused by icy conditions on

sidewalks. The Minnesota Supreme Court summarized the history of the doctrine as follows:

A municipality has never been held liable for injuries sustained in a fall on newly formed glare ice although a municipality is liable if it negligently permits an accumulation of ice and snow to remain on a sidewalk for such a period of time that slippery and dangerous ridges, hummocks, depressions, and other irregularities develop there.

Doyle v. City of Roseville, 524 N.W.2d 461 (Minn. 1994), citing a line of cases including Henkes v. City of Minneapolis, 42 Minn. 530, 44 N.W. 1026 (1890).

The rationale was that, in a case involving a slip and fall on a city sidewalk,

There can be no recovery against the city, unless it is the duty of such municipalities to keep their sidewalks clear of ice. In this climate, such a thing would be a physical impossibility, and an attempt to do it would involve an amount of expenses that would bankrupt any city. No court has ever held that reasonable care required an attempt to do any such thing. An unbroken line of authorities holds that mere slipperiness of a sidewalk by either ice or snow is not a defect for which cities are liable; that their obligation to keep their streets in a safe condition does not extend to the removal of ice which constitutes no other defect than slipperiness.

Doyle, citing Henkes, 42 Minn. at 532, 44 N.W. at 1027.

“Municipality” is defined in Minnesota as any city, county, town, public authority, public corporation, or other similar local political subdivision. See, e.g., Minn. Stat. §466.01, Subd. 1. “Municipality” obviously does not include the State of Minnesota or agencies of the State of Minnesota. Of the approximately 38 cases in which the mere slipperiness doctrine has been evoked by Minnesota appellate courts, all involved “municipalities” and none involved the state or state agencies.

It is instructive that, in its Memorandum to the Trial Court, Defendant repeatedly inserted the term “government entity” in case citations where the actual word used was “municipality” or “city”. That is because, as clearly defined in the more than 100 years of Minnesota common law, the mere slipperiness doctrine only applies to municipalities, and not the State of Minnesota or its subdivisions or agencies.

It is clear from the language quoted approvingly by the Supreme Court in Doyle, that the rationale for the mere slipperiness doctrine does not and should not apply to this case. First, as noted, the doctrine applies only to municipalities, and not the state. Second, it was expressly created to protect cities from liability for slippery conditions on city sidewalks and streets, where there is expected to be pedestrian and vehicle traffic. Economically, it was simply impossible to require a municipality to maintain non-slippery conditions during Minnesota winters on all of the miles and miles of sidewalks and streets owned by them.

The scope of the mere slipperiness rule is defined by the reason for its existence. Bufkin v. City of Duluth, 291 N.W.2d 225 (Minn. 1980). Here, the driveway in front of the Crane Lake shop was not open to the public. It was owned by the state for the purpose of housing vehicles used by the Department of Natural Resources forestry employees. Those employees routinely cleared and maintained the area to remove the threat of slipperiness for themselves; since Defendant expressly invited Plaintiff onto the property and directed him to go to the exact spot where he fell on the ice, the mere slipperiness doctrine cannot be held to somehow

protect Defendant from liability. The reason for the rule is not satisfied by its application to the statute in this case. When Minn. Stat. §466.03 was enacted to codify municipal sovereign immunity for slippery conditions on sidewalks and streets, it followed the common law rule using the same rationale. The state version of the sovereign immunity law was codified in Minn. Stat. §3.736, Subd. 3(d), which expressly did not adopt the same rule as the mere slipperiness doctrine nor the underlying rationale for it.

There Trial Court ultimately held that the legislature intended for the State to be considered a municipality in regards Minn. Stat. § 466.03 despite the very language of the statute applying strictly to municipalities, the plain language of Minn. Stat. § 3.736 applying to State tort immunity, and the complete absence of any prior decisions interpreting the statute that way. Moreover, the State has failed to raise any defense regarding immunity under Minn. Stat. § 3.736. Therefore, the Court of Appeals should reverse the Trial Court's peculiar interpretation of whether the State is a municipality under Minn. Stat. § 466.03.

**II. THE MERE SLIPPERINESS DOCTRINE DOES NOT APPLY TO INJURIES WHERE THE STATE SPECIFICALLY INSTRUCTS AN INVITEE TO A KNOWN DANGER THAT IS NOT OPEN TO THE PUBLIC.**

Under the mere slipperiness rule, a municipality is not liable for mere slipperiness resulting from the natural accumulation on streets and sidewalks of ice and snow, however dangerous to pedestrians the situation thus created may be. But

the rule has its exceptions. Otis v. Anoka-Hennepin School Dist. No. 11, 611 N.W.2d 390, 392 (Minn. App. 2000).

Every case the State cites regarding the mere slipperiness doctrine provides for immunity for ice in either sidewalks, streets, or public entryways. Doyle v. City of Roseville provided immunity from an injury to a member of the public who slipped on ice at a hockey arena. 524 N.W.2d 461 (Minn. 1994). Kuehl v. Metropolitan Airports Com'n provided immunity for an injury to an employee who slipped at a giant parking ramp at the Minneapolis-St. Paul International Airport. Not Reported in N.W.2d, 2007 WL 2034434 (Minn. App. 2007).

This is not a situation where a pedestrian slips on a sidewalk in front of a public building. See Otis v. Anoka-Hennepin School Dist. No. 11, 611 N.W.2d 390 (Minn. App. 2000) (holding that a municipality is not liable for mere slipperiness of sidewalk, however dangerous to pedestrians the situation may be). Mr. Rodenwald was not on a sidewalk and was not even a pedestrian. He was a hired invitee specifically directed to exit his truck in the exact location that the State knew was dangerously icy.

Mr. Rodenwald's injury is unique because unlike every other plaintiff in which the mere slipperiness doctrine has applied, this injury happened because the State directed him to park his vehicle on an ice patch that it knew was dangerous. That ice patch was located in an out-of-way spot that was not open to the public. The mere slipperiness doctrine was never intended to immunize the state from luring people into a trap.

Under Minnesota law, “[p]ossessors of land owe entrants a duty to exercise reasonable care in maintaining that land.” Taney v. Independent School District No., 673 N.W.2d 497, 502 (Minn. App. 2004). This duty is an ongoing one, and the landowner must “inspect and maintain their property so that unreasonably dangerous conditions will be discovered.” Id.; see also CivJig 85.43 (“[t]he landlord’s duty includes the responsibility to use reasonable care to inspect, to find, and to repair dangerous conditions”). Once discovered, a landlord “must either remedy the condition or provide entrants adequate warning of the condition.” Id. This duty, however, is not an absolute one, and “[a] possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” Baber v. Dill, 531 N.W.2d 493, 496 (Minn.1995) (emphasis added), quoting Peterson v. W.T. Rawleigh Co., 144 N.W.2d 555, 557 (Minn. 1966), quoting in turn, RESTATEMENT (SECOND) OF TORTS § 343A (1965).

Even with an open and obvious hazard, the landowner owes a duty if it “should anticipate the harm despite such knowledge or obviousness.” See Sutherland v. Barton, 570 N.W.2d 1 (Minn.1997). Thus, application of this rule involves a two-step inquiry: (1) Whether the activity or condition known or obvious to the injured person. (2) Even if the activity or condition was known or obvious, whether the landowner should still have anticipated the harm. Louis v. Louis, 636 N.W.2d 314, 322 (Minn.2001).

But even if the condition causing the harm is obvious, a landowner may still be liable if the landowner should have anticipated the harm despite the obvious condition. See Baber, 531 N.W.2d at 496. This second-step inquiry assesses the “foreseeability” of the injury. Sperr by Sperr v. Ramsey County, 429 N.W.2d 315, 318 (Minn.App. 1988) (holding landowner could not anticipate harm from low-hanging branch when no sidewalks or paths led to the tree and a safe alternative route existed). In this inquiry, the Court must consider that the landowner should anticipate the harm if he has reason to expect that the visitor's attention may be distracted, so the visitor (a) will not discover what is obvious, (b) will forget what is obvious, or (c) will fail to protect against the obvious. RESTATEMENT (SECOND) OF TORTS § 343A (1965). See Cameron v. Manners, Not Reported in N.W.2d, 2002 WL 1163605.

Here, the State believed that the ice had formed during the previous week. Stegmeir Depo, p. 17. The scope of the “mere slipperiness” rule is defined by the reason for its existence. Bufkin v. City of Duluth, 291 N.W.2d 225 (Minn. 1980). The driveway in front of the Crane Lake shop was not open to the public. It was owned by the state for the purpose of housing vehicles used by the Department of Natural Resources forestry employees. Those employees routinely cleared and maintained the area to remove the threat of slipperiness for themselves; since Defendant expressly invited Plaintiff onto the property and directed him to go to the exact spot where he fell on the ice, the mere slipperiness doctrine cannot be held to somehow protect Defendant from liability. The reason for the rule is not satisfied

by its application to the statute in this case. When Minn. Stat. §466.03 was enacted to codify municipal sovereign immunity for slippery conditions on sidewalks and streets, it followed the common law rule using the same rationale.

Minn. Stat. §466.03, subd. 4 provides:

Any claim based on snow or ice conditions on any highway or public sidewalk that does not abut a publicly owned building or publicly owned parking lot, except when the condition is affirmatively caused by the negligent acts of the municipality.

This situation does not involve ice conditions on a highway, public sidewalk, or publicly owned parking lot. Therefore, Minn. Stat. §466.03, subd. 4 does not apply.

At the very least, the issue of whether the possessor could have anticipated harm despite the obviousness of the danger posed is a question for the fact-finder. Olmanson v. LeSueur County, 693 N.W.2d 876, 881 (Minn. 2005); cf. Bjerke v. Johnson, 742 N.W.2d 660, 667 n. 4 (Minn.2007) (noting that broader issue of whether defendant has duty is generally question of law).

**III. WHETHER THE STATE IS IMMUNE FROM LIABILITY MUST BE DETERMINED UNDER MINN. STAT. §3.736.**

The State of Minnesota is not immune from liability for personal injury caused by the act or omission of an employee of the state except under certain specified circumstances. Minn. Stat. §3.736, Subd. 1. Among the circumstances arguably applicable here are an injury caused by the performance or failure to perform a discretionary duty or a loss caused by snow or ice conditions on a highway or public sidewalk abutting part of a publicly owned building or publicly

owned parking lot, except when the condition is affirmatively caused by the negligent acts of a state employee. Minn. Stat. §3.736, Subd. 3 (b) and (d).

The mere slipperiness doctrine that applies to municipalities was not codified in Minn. Stat. §3.736, presumably because it had never applied to the state or its agencies under common law. Claims against the State of Minnesota or its agencies involving injuries caused by slippery conditions have been analyzed by the courts under this statute. See, e.g., In Re Alexandria Accident of February 8, 1994 (561 N.W.2d 543 (Minn. App. 1997)); Hennes v. Patterson, 443 N.W.2d 198 (Minn. App. 1989). Plaintiff has not been able to find any cases in which a Minnesota appellate court applied the mere slipperiness standard, rather than §3.736, in a case involving the State.

Neither of the statutory exclusions to the abrogation of sovereign immunity apply here. First, this was obviously a ministerial, rather than discretionary omission by the State DNR employees. They recognized a duty to clear snow and ice, and to put salt and sand down on icy conditions, where warranted. The buckets of salt and sand were available for that purpose. They simply failed to do so during the days before Mr. Rodenwald fell on March 15, 2007. The state does not claim, in any event, that there was some sort of discretionary immunity to the claims in this case.

Second, the plain language of Minn. Stat. §3.736, Subd. 3(d) does not apply. First, the injuries suffered by Mr. Rodenwald did not occur “on a highway or public sidewalk.” It did occur in an area abutting a publicly owned building. This, again,

is consistent with the underlying rationale for the mere slipperiness doctrine that applies to municipalities; as a policy matter, the courts and legislature must provide immunity for government subdivisions for conditions on public sidewalks and streets. It would be physically and economically impossible to require vigilance over all of the many thousands of miles of sidewalks and streets located in the state. However, it is not physically or economically impossible to require inspection and remediation of slippery conditions in other publicly owned areas, such as a driveway that abuts a public building such as the Crane Lake shop

The mere slipperiness doctrine is a red herring. Whether the State of Minnesota is immune from liability for injuries to Charles Rodenwald must be analyzed under the applicable statute, Minn. Stat. § 3.736. Since the state, under the plain terms of that statute, is not so immune, the motion should be denied.

**IV. THERE ARE GENUINELY DISPUTED MATERIAL FACTS WHICH PRECLUDE AN AWARD OF SUMMARY JUDGMENT.**

Even if the mere slipperiness doctrine applies to the State of Minnesota and its agencies, the state is immune only if the condition that caused Charles Rodenwald's injuries was "newly formed glare ice". Doyle v. City of Roseville, 524 N.W.2d 461 (Minn. 1994). The ice located on the driveway in front of the Crane Lake shop was not newly formed. It had been in existence a minimum of 20 hours before Mr. Rodenwald fell, and probably several days before that. The supervisor of the Orr facility believe that it had formed over the week prior to March

15, 2007. This fact, alone, is genuinely disputed, crucial to application of the doctrine in question, and can be resolved only by the finder of fact.

Second, since the state is immune under the statute only for injuries that occur due to slippery conditions on a public highway or sidewalk, there may be a dispute as to whether the driveway in front of the Crane Lake shop falls under the exception to abrogation of immunity.

Third, Defendant contends, based on weather records, that it was snowing at the time of Plaintiff's fall. Three eyewitnesses testified in deposition that it was not. Of course, if it was snowing, and the snow covered up the claimed "glare ice", then that may have an impact as to any claim of sovereign immunity. Whether it was snowing, in any event, is a fact genuinely disputed.

Similarly, Defendant contends in its brief that there was a "freeze thaw temperature cycle" occurring at the time of Plaintiff's fall. It would appear from the weather records that any snow melt occurring in March of 2007 had ended almost a full day before Plaintiff fell. Whether there was any kind of freeze thaw cycle occurring on March 15, 2007, would appear to be another genuinely disputed material fact.

Finally, when the ice formed, and whether Defendant had sufficient constructive notice to trigger a duty to remedy it, is also in dispute. Plaintiff contends that, since the supervisor knew that icy conditions could form in this area in March, and also acknowledged that the icy conditions upon which Plaintiff fell had probably been in existence for a week, that the state had ample constructive

notice, and should have done something even as simple as throwing a handful of salt onto the area.

**CONCLUSION**

The Court of Appeals should reverse. The mere slipperiness doctrine, which provided common law immunity to municipalities, does not apply to the State of Minnesota or its agencies. Instead, any claim of sovereign immunity to the state must be analyzed under Minn. Stat. §3.736. Under that statute, the state is clearly not immune. Even if the Court shoehorned the State into the confines of municipal immunity, the mere slipperiness doctrine does not apply where the State specifically directed an invitee to exit his vehicle on a known dangerous ice patch. Finally, genuine issues of material fact exist to preclude summary judgment.

Respectfully submitted,

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Dated: August 4, 2009

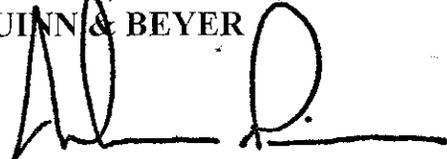
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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,108 words. This brief was prepared using Microsoft Word (2007).

**FALSANI, BALMER, PETERSON,  
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